

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Application of)
ALLIANCE FOR HIGHER EDUCATION.) File No. 20040712AAA
For Authority to Assign Instructional)
Television Fixed Service Station Licenses)
KWU29, Fort Worth, TX, and KWU30,)
Dallas, TX)

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 2004

Released: December 13, 2004

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On July 12, 2004, Alliance for Higher Education (Alliance) filed an application to assign Instructional Television Fixed Service (ITFS) Stations KWU29 (channels E1-E4), Fort Worth, TX, and KWU30 (channels F1-F4), Dallas, TX to Nextel Spectrum Acquisition Corporation (Nextel). Alliance also requests a waiver of the Commission's policy of only allowing pro forma assignments of grandfathered E and F Group ITFS licenses by incumbent licensees. For the reasons set forth below, we grant the Waiver Request.

II. BACKGROUND

2. In 1963, the Commission established ITFS in the 2500-2690 MHz band on a shared basis with existing Fixed Service stations. When the Commission established ITFS, it indicated that the service was envisioned to be used for transmission of instructional material to selected receiving locations in accredited public and private schools, including colleges and universities, for the formal education of

1 On July 29, 2004, the Commission released a Report and Order and Further Notice of Proposed Rulemaking that transforms the rules governing ITFS and the Multichannel Multipoint Distribution Service (MDS) in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, et al.; WT Docket Nos. 03-66, et al., Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and ITFS the Educational Broadband Service. Once the new rules become effective, we will no longer refer to these services as MDS and ITFS.

2 File No. 20040712AAA (filed Jul. 9, 2004) (Application).

3 Request for Waiver (filed Jul. 9, 2004) (Waiver Request).

4 See Educational Television Report and Order, Docket No. 14744, 39 FCC 846 (1963), recon. denied, 39 FCC 873 (1964) (ETV Decision).

students.⁵ In 1971 the Commission designated 28 six-megahertz channels, channel groups A-G, exclusively for ITFS use.⁶ In 1983, however, the Commission reallocated eight of those channels, the E and F channel groups, to the Multichannel Multipoint Distribution Service (MDS).⁷ The Commission took that action in an effort to spur the development of competition to cable television systems and to promote effective and intense utilization of the spectrum.⁸ Although the Commission permitted ITFS licensees on the E and F group channels to remain operating by “grandfathering” them, including rights of renewal, the Commission stated that “[n]o assignments, other than pro forma assignments of ITFS E or F group licenses, application or construction permits will be authorized.”⁹ Although this prohibition was never codified in the Commission’s Rules, it remains a Commission policy. In 1998, the Commission adopted technical rule changes designed to provide ITFS licensees flexibility to employ digital technology in delivering two-way communications services including high-speed and high-capacity data transmission and Internet service on a regular basis.¹⁰ On June 10, 2004, the Commission adopted new rules which will enable the provision of wireless broadband service in the 2500-2690 MHz band.¹¹

3. Alliance is the grandfathered E and F group channel licensee of ITFS Stations KWU29, E-group, Fort Worth, Texas and KWU30, F-group, Dallas, Texas.¹² On April 3, 1996, Dallas MDS Partners (Dallas MDS) obtained an authorization for MDS Station WMY464, operating on the E Group channels at Dallas, Texas.¹³ In 1999, the Commission expanded the co-channel protected service areas (PSAs) of MDS and ITFS site-based licenses from a radius of 15 miles to a radius of 35 miles, but grandfathered incumbent stations that were short-spaced with respect to each other under the new interference protection standards.¹⁴ Under the new standards, Alliance’s E-Group Fort Worth ITFS

⁵ Amendment of the Commission's Rules With Regard to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service; and Applications for an Experimental Station and Establishment of Multi-Channel Systems, *Report and Order*, 48 Fed. Reg. 33873, 33875 ¶ 9 (1983) (*1983 R&O*) (citing *ETV Decision*, 39 FCC at 853 ¶ 25).

⁶ Amendment of Parts 2 and 74 of the Commission’s Rules and Regulations to Establish a New Class of Educational Television Service for the Transmission of Instructional and Cultural Material to Multiple Receiving Locations on Channels in the 2500-2690 MHz Frequency Band, Amendment of Parts 81, 87, 89, 91, and 93, Docket No. 14744, *Second Report and Order*, 30 FCC 2d 197 at ¶13 (1971).

⁷ Amendment of Parts 2, 21, 74 and 94 of the Commission’s Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Service, *Report and Order*, 94 FCC 2d 1203 (1983). (*E and F Group Reallocation Order*).

⁸ *Id.* at ¶ 60-61.

⁹ *Id.* at ¶ 85(c).

¹⁰ See Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Report and Order*, 13 FCC Rcd 19112 (1998) (*Two-Way Order*).

¹¹ Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165 (2004).

¹² See Alliance for Higher Education, *Memorandum Opinion and Order*, 19 FCC Rcd 4569, 4570-4571 ¶ 4 (WTB-BD 2004) (*Alliance MO&O*).

¹³ File No. BPMD-8950164.

¹⁴ See Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order on Reconsideration*, 14 FCC Rcd 12764, 12796-12797 ¶ 69 (1999) (*Two-Way Reconsideration*); Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations, *Declaratory Ruling and Order*, 11 FCC Rcd 18839, 18853-18854 ¶¶ 23-24 (1996) (*Digital Declaratory Ruling*).

station and Dallas MDS's E-Group station were short-spaced with respect to each other, but were grandfathered.¹⁵

4. On May 18, 1998, Alliance filed an application to assign the licenses for Stations KWU29 and KWU30 to CS Wireless Systems, Inc. (CS).¹⁶ That application did not request a waiver of the Commission's policy prohibiting assignments of grandfathered E-and-F-channel group ITFS stations.¹⁷ The applications were accepted for filing on June 3, 1998. Dallas MDS filed a petition to deny on July 2, 1998.¹⁸ Alliance's application was ultimately denied for, *inter alia*, failure to request a waiver of the Commission's policy regarding non-*pro forma* transfers of grandfathered ITFS licenses.¹⁹

5. In April 2004, Nextel obtained the MDS Basic Trading Area (BTA) authorization for the Dallas-Forth Worth BTA²⁰ from Nucentrix, the 1996 auction winner of the MDS Basic Trading Area²¹ (BTA) authorization for the Dallas-Forth Worth BTA.²² On July 9, 2004, Alliance filed an application to assign KWU29 and KWU30 to Nextel and a request for a waiver of the Commission's policy prohibiting the assignment of grandfathered E and F group ITFS stations.

III. DISCUSSION

6. At the outset, we note that the assignment of Stations KWU29 and KWU30 from Alliance to Nextel is non-pro-forma in nature and thus, Alliance correctly seeks a waiver of the Commission's policy prohibiting grandfathered E and F channel ITFS licensees from assigning their licenses in such a situation. "An applicant for waiver faces a high hurdle even at the starting gate. 'When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.'"²³ In this case, we conclude that Alliance has justified a waiver.

7. As noted above, the Commission adopted the policy prohibiting incumbent E and F group licensees from assigning their ITFS stations to enable wireless multichannel video programming distributors to compete with cable television systems and to promote effective and intense utilization of the spectrum. We further note that this policy was never codified into the Commission's Rules. Since the adoption of this policy, however, the Commission has made two significant changes to the MDS and ITFS services. First, as noted above, in 1998 the Commission adopted the *Two-Way Order*, which changed the technical rules in the 2500-2690 MHz band to enable the provision of digital two-way communications services, including high-speed and high-capacity data transmission and Internet service.

¹⁵ Alliance *MO&O* at ¶ 4.

¹⁶ *Id.* at ¶ 6.

¹⁷ *Id.*

¹⁸ See File No. 50423-CM-AL-(2)-98.

¹⁹ *Id.*

²⁰ Applications to Assign Wireless Licenses from WorldCom, Inc. (Debtor-in-Possession) to Nextel Spectrum Acquisition Corp., WT Docket No. 03-203, *Memorandum Opinion and Order*, 19 FCC Rcd 6232 (WTB 2004) (*WorldCom Order*).

²¹ Alliance *MO&O* at ¶ 5.

²² *Id.*

²³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968) (*per curiam*)).

More recently, in July 2004, the Commission adopted a new band plan and technical rules for the ITFS and MDS services to promote the development of broadband services.²⁴

8. In this specific context, we believe that permitting Alliance to assign its grandfathered E and F group ITFS licensees to Nextel would further the Commission's purpose of reallocating the E and F channels to the MDS service. Thus, we conclude that the underlying purpose of the Commission's policy, to reallocate the E and F channels from the ITFS service to the MDS service would be served by granting a waiver in this particular case. Moreover, as noted above, Nextel obtained the MDS BTA for the Dallas-Fort Worth BTA from Nucentrix, the 1996 auction winner. MDS BTA authorizations give their holders reversionary rights to any unoccupied or abandoned MDS channels in the BTA.²⁵ Thus, under normal circumstances, if Alliance were to return its E and F Group channels in the Dallas-Forth Worth area to the Commission, the relinquished channels would revert to the BTA authorization holder, which is Nextel.

9. In this case, however, much of the coverage area of the Alliance's Fort Worth station falls within the 35-mile PSA of Dallas MDS's station.²⁶ If the Alliance were to return its licenses to the Commission, Nextel could claim the reversionary rights but would have to respect the 35-mile PSA of the Dallas MDS station. In effect, that portion of the Alliance's 35-mile PSA that overlaps with the Dallas MDS 35-mile PSA would go to Dallas MDS, not to Nextel. In this particular instance, however, the Division has consented to allowing Dallas MDS to assign its authorization to operate Station WMY464 to Nextel.²⁷ Thus, if Alliance were to turn its licenses into the Commission, Nextel not only has the reversionary interest as the BTA holder, but it will also hold the authorization for Station WMY464, the E-group co-channel licensee. Therefore, allowing Nextel to acquire Alliance's licenses would not have a negative impact on any other MDS licensee. Thus, we conclude that it is in the public interest to grant this waiver.

IV. CONCLUSION AND ORDERING CLAUSE

10. For the reasons discussed above, we grant Alliance's request for a waiver of the Commission's the policy prohibiting ITFS licensees from assigning grandfathered E and F channels when the assignment is non-pro-forma in nature. We direct processing of Alliance's application to assign Stations KWU29 and KWU30 to Nextel.

11. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 21.19 of the Commission's Rules, 47 C.F.R. § 21.19, that the waiver request filed by Alliance for Higher Education on July 9, 2004 in connection with File Nos. 20040712AAA IS GRANTED, and that the Commission's policy prohibiting the non-pro forma assignment of grandfathered Instructional Television Fixed Service E and F channels IS WAIVED.

²⁴ Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004).

²⁵ See Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, *Report and Order*, MM Docket No. 94-131, 10 FCC Rcd 9589 (1995) (*MDS Auction R&O*).

²⁶ See File No. 50423-CM-AL-(2)-98 at ¶ 5.

²⁷ See File No. 20040804AAB (granted Oct. 4, 2004).

12. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309 that the licensing staff of the Broadband Division SHALL PROCESS the captioned assignment application consistent with this *Order on Reconsideration* and the Commission's Rules.

13. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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